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IN THE

Supreme Court of the United States

October Term, 1965
No. 375

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee

On Appeal from the United States District Court for the Middle District of Pennsylvania.

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

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Appellant

vs.

The Pennsylvania Railroad Company,
Appellee

On Appeal from the United States District Court for the Middle District of Pennsylvania

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JURISDICTIONAL STATEMENT

I.
OPINIONS BELOW

The Opinion and Order of the District Court for the Middle District of Pennsylvania was filed on April 5, 1965, and is attached hereto as Appendix A. This decision is reported in 240 F. Supp. 233. The Opinion and Order of the District Court for the Middle District of Pennsylvania, dated March 20, 1963, denying defendant-appellant's motion to dismiss, is attached hereto as Appendix B. This order is reported in 215 F. Supp. 493.

II.

JURISDICTION

This is a civil action brought by The Pennsylvania Railroad Company to enjoin the Pennsylvania Public Utility Commission and, the members thereof, from enforcing the order of the Pennsylvania Public Utility Commission, dated July 9, 1962, under the Act of Congress approved June 25, 1948, c. 646, 62 Stat. 931, 28 U.S.C. 1337 and the Act of Congress regulating commerce, approved August 12, 1958, P. L. 85-625, Section 5, 72 Stat. 571, known as the Transportation Act of 1958 and as Section 13a(1) of the Interstate Commerce Act, Part I, 49 U.S.C. 13a(1). The defendants claimed, *inter alia*, as a defense, that Section 13a(1) of the Transportation Act of 1958 was, as applied to the particular circumstances, unconstitutional. By order dated May 8, 1964, Follmer, J. certified to the Attorney General that the constitutionality of the Transportation Act of 1958 has been drawn into question and authorized the Attorney General to intervene if he so desired. The Attorney General, by letter, declined such intervention. By order dated September 3, 1964, a three-judge court was convened in pursuance of 28 U.S.C. §2281. After argument had, April 5, 1965, the three-judge court sustained the complaint and enjoined The Pennsylvania Public Utility Commission and its members. Notice of Appeal was filed by the Pennsylvania Public Utility Commission on May 21, 1965. The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1253

and 2101(b). The word "statute" in 28 U.S.C. §2281 comprehends State administrative orders: *Alabama Public Service Comm. v. Southern Ry. Co.*, 341 U.S. 341, 343 (footnote 3); *Driscoll v. Edison Co.*, 307 U.S. 104, 108; *Oklahoma Gas Co. v. Russell*, 261 U.S. 290. Invalidation of a state order based upon the Supremacy Clause of the Constitution involves a constitutional question under §2281 of Title 28 if the case presents an "immediate" controversy: *Kessler v. Dept. of Public Safety, etc., Utah*, 369 U.S. 153, 155-158; *U. S. v. Georgia P.S.C.*, 371 U.S. 285, 286-287; *Paul v. U. S.*, 371 U.S. 248, 249-250. The question of whether the constitutional power of Congress over interstate commerce and, matters relating thereto, was being thwarted by the Pennsylvania Public Utility Commission raises a substantial federal question requiring a three-judge court: *Paul v. U. S.*, 371 U.S. 248, 249; *U. S. v. Georgia P.S.C.*, 371 U.S. 285, 287. Once convened, the case can be disposed of below or by the Supreme Court on any ground, whether or not it would have justified the calling of a three-judge court: *U. S. v. Georgia P.S.C.*, 371 U.S. 285, 288.

III.

QUESTIONS PRESENTED

The following questions are presented for determination upon this appeal:

1. **Whether the District Court erred in holding Section 13a(1) of the Transportation Act of 1958, 49 U.S.C. 13a(1), as applied to the particular circumstances of this case, constitutional, where the Act imposed supersession of a State Order over intrastate commerce upon the mere filing of notice by the Railroad without any findings of an undue burden on interstate commerce, and where no opportunity was afforded to the State to be heard before its order was superseded.**

2. **Whether the District Court erred in failing to dismiss the complaint, where the Railroad had fully litigated the same case before the State Public Utility Commission and had permitted the time within which the State Law required an appeal to the State Appellate Court to be filed to expire when it filed its action in the Federal District Court, based upon the Doctrine of Comity, the constitutional principle of Full Faith and Credit, and the law of res judicata.**

IV.

STATUTES INVOLVED

Title 49 U.S.C. 13a(1):

Pennsylvania Public Utility Law of May 28, 1937, P.L. 1053. Sections 401, 403, 1101 and 1112 are as follows:

Discontinuance or change of certain operations or services. Sec. 13a. [August 12, 1958.] [49 U. S. C. §13a.] (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the deci-

sion or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be

superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

Section 401 (66 P.S. §1171). **Character of Service and Facilities.**—Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employes and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this act and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility.

Section 403 (66 P.S. §1173). **Operation and Distribution of Facilities of Common Carriers.**—Every common carrier shall furnish a reasonably sufficient number of safe facilities, and run and operate the same with such motive power as may reasonably be required, in the transportation of all such passengers or property as may seek, or be offered to it, for such transportation, and shall operate its facilities with sufficient frequency, at such rea-

sonable and proper times, and to and from such stations or points, as the commission, having regard to the accommodation, convenience, and safety of the public, may require; and, when required by the commission, shall change the time schedule for the operation of its facilities, and, generally, shall make any other arrangements and improvements in its service which the commission may require. If, at any particular time, a common carrier may not have sufficient facilities to meet the requirements for the transportation of property, then it shall lawfully distribute all available facilities among the several applicants therefor without discrimination between shippers, localities, or competitive or noncompetitive points, in accordance with such regulations as the commission may prescribe: Provided, That such regulations, in the case of common carriers also engaged in interstate commerce, shall conform so far as practicable to those prescribed by any Federal regulatory body on the subject: And provided further, That preferences may always be given in the supply of facilities for transportation of fuel, livestock, or perishable matter.

Section 1101 (66 P.S. §1431). **Appeals to Courts; Jurisdiction and Practice.**—(a) Within thirty days after the service of any order by the commission, unless an application for a rehearing may be pending, and then within thirty days after the service of the order refusing such application, or the service of an order modifying, amending, rescinding, or affirming the original order, any party to the proceedings affected thereby may appeal therefrom to the Superior Court. Such court is hereby clothed with exclusive jurisdiction throughout the Commonwealth

for the purpose of hearing and determining any and all such appeals; . . . .

(b) All appeals to the Superior Court shall be by petition, setting forth specifically and concisely the error or errors assigned to the order of the commission, which petition shall be accompanied by a copy of the order appealed from, and shall also be accompanied by affidavit of the appellant, or of the agent or attorney of such appellant, that the appeal is not taken for the purpose of delay, but because the appellant verily believes that injustice has been done. Each error relied on must be specified particularly and set forth in a separate numbered paragraph of the petition.

Section 1112 (66 P.S. §1442). **Effect of Commission Action.**—Whenever the commission shall make any rule regulation, finding, determination, or order under the provisions of this act, the same shall be prima facie evidence of the facts found, and shall remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal to the Superior Court taken as provided in this act.

V.

STATEMENT OF THE CASE

On November 29, 1960, The Pennsylvania Railroad Company ("Pa. R.R.") applied to the Pennsylvania Public Utility Commission ("P.U.C.") for permission to discontinue trains Nos. 638 and 645 between Harrisburg, Pennsylvania, and the Pennsylvania-Maryland boundary line. These trains stopped at Carlisle, Chambersburg and Greencastle, all in Pennsylvania, and made only one stop in Maryland at Hagerstown.

The P.U.C., after hearings held, by order dated August 7, 1961, denied the application. No appeal was taken from this order by the Pa. R.R. to the courts. The appellate procedure in Pennsylvania is almost identical with that in Alabama as reported in *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951).[1]

On January 25, 1962, the Pa. R.R. filed a notice of discontinuance with the Interstate Commerce Commission ("I.C.C.") under 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1), setting forth "its intention to discontinue, effective February 25, 1962, operation of passenger Train 638 from Hagerstown, Maryland, to Har-

[1] Failure to appeal a P.U.C. order is decreed by statute to make the order "conclusive upon all parties affected thereby." Section 1112, 66 P.S. §1442; *Allegheny Steel Co. v. N.Y.C. R.R. Co.*, 324 Pa. 353, 360, 188 A. 332; Cf., *Angel v. Bullington*, 330 U.S. 183 (1947).

risburg, Pennsylvania, and of passenger Train 645 from Harrisburg to Hagerstown."

The notice further stated that: "Persons desiring to object to the proposed discontinuance should promptly notify the Interstate Commerce Commission at Washington, D.C. of such objection and the reasons therefor **before February 11, 1962.**"

On February 8, 1962, the P.U.C. sent a formal protest to the I.C.C. **On the same date** the I.C.C. issued a notice of its decision not to enter upon an investigation. Additional protests continued to be sent to the I.C.C. and that body on March 23, 1962, by notice issued, stated that since 30 days had passed from the date of the original filing, it no longer had any authority to act in the matter.

On February 20, 1962, the P.U.C. issued a rule upon the Pa. R.R. to show cause why it should not maintain service as required by its order of August 7, 1961. An answer was duly filed by the Railroad and hearing was held on the Rule. By order, dated July 9, 1962, the P.U.C. made the rule absolute and ordered the Railroad, for the second time, to continue service as previously ordered.

The Railroad took no appeal to the Pennsylvania courts. But on August 9, 1962, it filed a complaint in the United States District Court for the Middle District of Pennsylvania, seeking to enjoin the P.U.C.

The P.U.C. filed a Motion To Dismiss on the grounds: (1) that the Federal Court should not entertain jurisdiction on the ground of comity, (2) that since the Railroad submitted to the jurisdiction of the P.U.C. and it took no appeal from the order requiring it to continue serv-

ice, it was bound by Pennsylvania law and The Federal Court was obliged to accord to the order of the P.U.C. "full Faith and Credit"; and (3) that the issues raised in the Federal Court proceedings were all raised and passed upon by the P.U.C., and the Railroad, by failing to appeal through the appellate court procedure in the State, was now bound by the principle of *res judicata*. The District Court denied the motion "in the present posture of the case." 215 F. Supp. 493.

Following a pretrial conference, a Case Stated was composed by the parties with all the necessary exhibits, including the P.U.C. orders and I.C.C. notices. After argument had, the District Court entered an injunction against the P.U.C. and its members. The present appeal from that injunction followed.

VI.

THE QUESTIONS ARE SUBSTANTIAL

(a) Section 13a(1) of the Interstate Commerce Act as Applied in This Case Is Unconstitutional

1. Supersession of state orders occurred without any finding of undue burden as to the intrastate aspects.

The question left open in *Texas v. Eastern Texas R.R. Co.*, 258 U.S. 204 (1922), is squarely before the Court. In that case the Railroad owned a road lying entirely within the State of Texas for approximately 30 miles. Approximately 3/4 of the traffic over the road was in interstate and foreign commerce and the rest in intrastate commerce. The road was not part of another line. The Railroad did not own or operate any other line. On June 3, 1920, the Railroad filed with the I.C.C. an application for a certificate under Section 1(18) of the Interstate Commerce Act (§402 of the Transportation Act of 1920, c. 91, 41 Stat. 456, 477) to abandon and cease operating the road. The I.C.C. after hearing granted the application.

While the application was pending, the State of Texas brought an action in the State court, later removed to the Federal Court, to enjoin the Railroad from ceasing to operate the road in *intrastate* commerce. The State contended that the Transportation Act, if it authorized the abandonment as respects intrastate commerce, was uncon-

stitutional. The Railroad, having been issued a certificate from the I.C.C. in the meantime, set up its certificate as a complete defense. The District Court so held. The State of Texas in the meantime had also filed a complaint in the Federal District Court in Texas to set aside the I.C.C. order and certificate on the grounds that the I.C.C. did not have authority under the Transportation Act to authorize the abandonment of the road as respects intrastate commerce and, if the Act purported to bestow that authority upon the I.C.C., it was unconstitutional. The District Court dismissed the bill. Appeals were taken by the State of Texas as the aggrieved party in both cases to the Supreme Court of the United States and the cases were consolidated for decision.

The Supreme Court first decided that with respect to the interstate and foreign business, Congress could and did empower the I.C.C. to act and the Commission's certificate was adequate for that purpose. The Court then approached the question of whether Congress had also clothed the Commission with authority to sanction the entire abandonment of the road both as to interstate and intrastate commerce, and if it had, whether the power of Congress extended that far.

The Supreme Court construed the Act as not intending to endow the Commission with power over the intrastate business of the road and thus by construction avoided "a serious question of [its] constitutional validity."

Section 13a(1) of the Transportation Act of 1958 **can not be so construed to avoid the serious question as to its**

constitutional validity. In unmistakable language the Act intends to confer upon the Railroad the right to discontinue not only the interstate and foreign commerce aspects of the train but also the intrastate aspects. It reads in part:

> "The carrier or carriers filing such notice may discontinue or change **any** such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, **the laws or constitution of any State, or the decision or order of, or** the pendency of any proceeding before, **any court or State authority to the contrary notwithstanding.**"

It would appear clear from the Act that the word "**any**" in the above quote refers to the intrastate aspects as well as the interstate aspects. The District Court below so held and enjoined the State agency. The Commonwealth of Pennsylvania had taken jurisdiction only over the **intrastate** aspects of the train travelling between Harrisburg and the Pennsylvania-Maryland boundary line. This was a power which it unqestionably had.[2]

This case presents the question of whether Congress could validly supersede a State order without requiring any findings to be made that the regulation by the Commonwealth of Pennsylvania over the intrastate aspects im-

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[2] *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341; *Palmer v. Comm. of Mass.*, 308 U.S. 79; *Missouri Pacific Railway Co. v. Kansas ex rel. Taylor*, 216 U.S. 262; *Banta v. U.S.*, 355 U.S. 34, affirming 152 F. Supp. 59; *Gulf, M. & O. R. Co. v. Louisiana P.S.C.*, 120 F. Supp. 250; *Southern Ry. Co. v. So. Car. P.S.C.*, 31 F. Supp. 707.

poses an undue burden upon interstate commerce.[3] This is the question left open in the *Texas* case, supra.

The same answer the Court would have given there should be given here as indicated by the following:

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable."

Not to belabor the obvious, Congress can regulate and supersede state orders over intrastate commerce when necessary to protect or foster interstate commerce. **Houston E. & W. Texas Rwy. Co. v. U. S. ("Shreveport Case")** 234 U.S. 342. Under a valid enactment based upon this standard, a state-prescribed order can be superseded, provided, however, that "there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." *N. C. v. U. S.*, 325 U.S. 507, 511. Proof of such must meet "a high standard of certainty," before a state order can be nullified. *P.S.C. of Utah v. U. S.*, 356 U.S. 421, 425. The justification for the exercise of federal power must "clearly appear." Ibid. **Where a finding is made** that continued operation

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[3] There is no reason to argue whether a fact finder should or should not find that State regulation constitutes a burden since no evidence was directed toward that issue. It may not be amiss to point out that the P.U.C. order of August 7, 1961 carefully analysed the entire picture and found that total operating revenues reached $202,162 while expenses came to $114,563, leaving a *net profit*, according to the Railroad's own figures of *$87,599*. It further found that 24.8 per cent of the patrons would be completely deprived of rail service by the discontinuance.

of a road in intrastate traffic as well as interstate traffic would constitute a burden on interstate commerce, then Congress through its agency, the I.C.C., can authorize the abandonment of a road both as to intrastate and interstate traffic. *State of Colorado v. U. S.*, 271 U.S. 153 (1926). But the I.C.C. could not authorize such abandonment **as to intrastate traffic** *without such findings*, and any Act of Congress so doing would, as the *Texas* case indicates, be unconstitutional: **This is exactly the situation before the Court.**

By the instant Act of Congress there is no limitation in the statute that state orders over intrastate commerce can be superseded only if they burden or affect interstate commerce. Therefore, in this case no finding was made that interstate and foreign commerce will be burdened or affected by a continuance of the purely intrastate business of the road.

If Section 13a(1) be held constitutional as applied here, then, by the same logic and theory underlying Section 13a(1), Congress could pass an Act decreeing that a carrier may change any rates subject to state orders on an interstate road by merely giving notice. Certainly, **the power of the Commonwealth of Pennsylvania to regulate service between Harrisburg and Greencastle is the same power which the State exercises over rates between the same two points**, even though the line is also an interstate road. Would anyone contend that such an act as applied to rates would be constitutional? But how can the cases be distinguished?

In *Yonkers v. U.S.*, 320 U.S. 685, 690, the Court said:

Questions Are Substantial

"In the application of the doctrine of the *Shreveport* case, this Court has required the Commission to show meticulous respect for the interests of the states. It has insisted on a 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of the state power, **the justification of the exercise of the federal power must clearly appear.**"

The necessary nexus for Federal supersession over state intrastate orders is not present or required in the Act under question.

"Every journey to a forbidden end begins with the first step . . ." *Carter v. Carter Coal Co.*, 298 U.S. 238, 295. To uphold the Federal Act under the circumstances here present would be very close to completing the journey to the forbidden end. "Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *Schechter Corp. v. U.S.*, 295 U.S. 495.

(a) New Jersey v. U.S., 359 U.S. 27, affirming 168 F. Supp. 324 (D.N.J. 1958) distinguishable.

While Section 13a(1) was upheld in that decision, "**a statute valid as to one set of facts may be invalid as to another.**" *Nashville, Chattanooga & St. Louis Ruy. Co., v. Watters*, 294 U.S. 405, 415 (1935). In the *New Jersey* case, the State of New Jersey sought to prevent the discontinuance of a ferry plying between New Jersey and New York. The ferry company had sent notice to the I.C.C. which declined to investigate and allowed the dis-

continuance to go into effect. **The State of New Jersey brought suit** in the Federal District Court **against the I.C.C.** claiming the right to a hearing. The District Court and your Honorable Court denied it such right.

In that case, however, there are two greatly differing characteristics: (1) **There was no State order!** and (2) **There was no intrastate matter involved!**

Before the 1958 Transportation Act was passed, the ferry company could have discontinued service without any obligation to the State of New Jersey whatsoever. *New York Central & H.R.R. Co. v. Hudson County*, 227 U.S. 248 (1913). The New Jersey courts themselves have so held: *Erie Railroad Company v. State*, 143 A. 2d 224 (1958). Nor did the ferry company even have to obtain I.C.C. approval for a discontinuance of passenger service, provided there was no total abandonment and freight service was still to be carried: *Board of Public Utility Commissioners of New Jersey et al. v. U. S.*, 158 F. Supp. 98, 104. The 1958 Transportation Act, therefore, required the ferry company to assume a greater burden than it previously had, namely, the giving of notice to the I.C.C. **Under these circumstances, the State of New Jersey was in no position to demand rights which it never had.**

On the other hand, our order in this case was a perfectly valid order which the Railroad company would be obliged to obey: *Banta v. U.S.*, 152 F. Supp. 59 (D. N.J. 1957). Any supersession of our order therefore **took away** very real rights from the Commonwealth of Pennsylvania. There are, therefore, very different considerations that are brought to bear in deciding this case as against the *New Jersey* case. "Constitutional questions

that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or **different exertions of power under it.**" *Polish Alliance v. Labor Board*, 322 U.S. 643, 649.

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2. The railroad is given unfettered discretion in deciding to abandon a line without any opportunity afforded to the State for a hearing to contest the exercise of discretion by railroad.

Under the facts of this case, the Railroad was given by statute unfettered discretion to decide what to abandon, and when, although its road was subject to lawful state orders. No opportunity was given to the Commonwealth of Pennsylvania to be heard or contest this unfettered discretion.

While a State has no duty to enforce the rights of its citizens in respect of their relations to the Federal Government, *Massachusetts v. Mellon*, 262 U.S. 447, the State has a right and duty to enforce its public policy as expressed in its statutes and institutions. *Hopkins Savings Assn. v. Cleary*, 296 U.S. 315, 339-341.

> "It is a principle that lies at the foundation of all jurisprudence in civilized countries that a person must have an opportunity of being heard before a court can deprive such person of his rights."
>
> *Leininger v. Reichle*, 148 N.E. 384, 389, 317 Ill. 625.

If the Commonwealth of Pennsylvania is entitled to such rights, as we here contend, it was not accorded those rights under the facts of this case.

Therefore, aside from the question of whether the Act as applied is constitutional as discussed before, the ments of **procedural due process** have been met. Notices of the proposed discontinuance of February 25, 1962 were posted by the Pa. R.R. at its stations. On February 20, 1962 an answer was duly filed. Contrast the section under consideration with Section 1(19) of the Interstate Commerce Act which requires notice to the state "with the right to be heard" abandonment under Section 1(18). Moreover, it may be noted that in Section 13a(2), the State is given notice and **a hearing**. It makes little difference to the State that the train under 13a(1) continues on across the state line, **but its rights are completely overlooked by 13a(1).**

(b) The District Court Should Have Declined Jurisdiction on the Basis of the Doctrine of Comity.

The situation in this case is almost identical with that in *Alabama Public Service Commission v. Southern Railway Company,* 341 U.S. 341. Federal questions were raised in both cases. There is no reason why the Railroad could not have appealed the Public Utility Commission decision to the State Courts and from them to the United States Supreme Court.

There is no proof whatsoever that the Pennsylvania procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in your Honorable Court any federal questions arising out of such order. 341 U.S. at 349. In fact, the Pennsylvania procedures are almost identical with those in Alabama as set forth in the *Alabama* case. As was said in *Georgia v. Chattanooga,* 264 U.S. 472, 483, "If the decision of that

court shall deny to Georgia any rights secured to it by the Constitution and laws of the United States, the case may be brought here for reexamination and review."

There is no valid reason why the Railroad should not be required to appeal its case through the Pennsylvania courts for review, and, if necessary, then to your Honorable Court. In *Burford v. Sun Oil Co.*, 319 U.S. 315, 333, it is reiterated:

> "On the other hand, if the state procedure is followed from the Commission (Texas Railroad Commission) to the State Supreme Court, ultimate review of the federal questions is fully preserved here."

For the reasons given, the Federal District Court should not have entertained jurisdiction.[4]

(c) The Administrative Order of the Public Utility Commission Is a "Record" or "Judicial Proceeding" Within the Full Faith and Credit Clause and Should Have Been Accorded the Same Respect as It Receives by the State.

The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings * * * shall have the same full faith and credit

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[4] Other federal courts have refused to do so in similar situations: *Atlantic Coast Line R.R. Co. v. City of St. Petersburg, Fla.*, 242 F. 2nd 613 (5th Cir. 1957); *Gulf, M. & O. R. Co. v. Louisiana Public Service Commission*, 120 F. Supp. 250 (La. D.C. 1954); *Gulf Oil Corporation v. Corporation Commission of Oklahoma*, 147 F. Supp. 640 (Okla. D.C. 1956).

in every court within the United States * * * as they have by law or usage in the courts of such States * * * from which they are taken." *Durfee v. Duke*, 375 U.S. 106, 109.

The Public Utility Commission order of July 9, 1962, requiring service was never appealed by the Railroad. It became a final and binding order under the Pennsylvania Public Utility Law, Sec. 1112 (66 Purdon's Penna. Statutes Annotated, §1442.)

An order of the Public Utility Commission is a record or judicial proceeding. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 443; *Broderick v. Rosner*, 294 U.S. 629.

The Public Utility Commission had jurisdiction over the person since it was the Railroad's own application to the Public Utility Commission. Whether the Public Utility Commission had jurisdiction over the subject matter was a matter in dispute. If by jurisdiction is meant the power to hear and determine causes of the class to which the particular controversy belongs (see *West Coast Exploration Co. v. McKay*, 213 F. 2d 582 (D.C. Cir. 1954), cert. denied, 347 U.S. 989), then the Public Utility Commission very definitely had jurisdiction over the subject matter. The continuance of railroad service in the State is expressly confided to the Public Utility Commission by statute. See sections 401 and 403 of the Public Utility Law (66 Purdon's Penna. Statutes Annotated, §§1171 and 1173). Even if the question of jurisdiction over the subject matter was an open one, if it is litigated and decided by an appropriate tribunal, and no appeal is taken, the issue cannot be retried in a subsequent action between the same parties: *Durfee v. Duke*,

375 U.S. 106; *Davis v. Davis*, 305 U.S. 32. The exceptions set forth in *Durfee v. Duke*, do not apply. In *Kalb v. Feuerstein*, 308 U.S. 433, the state court attempted to decide a matter **AFTER** the Bankruptcy court obtained jurisdiction. In *U.S. v. U.S.F. & G. Co.*, 309 U.S. 506, the court had **no competency** to try a cross-claim against the Indian Nation which could be sued only in a federal district court in the Indian reservation.

On the other hand, the matters raised by the Railroad were certainly matters over which the P.U.C. had **competency to determine.**

(1) Res judicata

Where litigation is conducted in the state courts to a finality, further litigation between the same parties involving the same issues cannot be adjudicated by a federal court, even though important federal issues are involved: *Angel v. Bullington*, 330 U.S. 183; *Baker Driveway Co. v. Hamilton*, 29 F. Supp. 693 (M.D. Pa. 1939).

The fact that litigation is not conducted through to the highest court in the State is of no moment: *Davis v. Davis*, 305 U.S. 32.

> "If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him."
>
> *Angel v. Bullington*, 330 U.S. 183, 187.

State courts operate under the same presumption accorded to federal courts, namely, "that they will do what

the Constitution and the laws of the State and the United States require." *Shreveport v. Cole*, 129 U.S. 36; *Defiance Water Co. v. Defiance*, 191 U.S. 184. In *Grubb v. P.U.C. of Ohio*, 281 U.S. 470, 475, it was said:

> "The appellant relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible."

CONCLUSION

The questions presented by this Appeal are substantial and require plenary consideration, with briefs and oral argument for their resolution.

Probable jurisdiction should be noted.

Respectfully submitted,

WILLIAM A. GOICHMAN,
Assistant Counsel,
EDWARD MUNCE,
Assistant Counsel,
JOSEPH C. BRUNO;
Chief Counsel,
For Penna. Public Utility Commission.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 7810

The Pennsylvania Railroad Company,

Plaintiff,

v.

Joseph Shaffsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, individually and as Commissioners of the Pennsylvania Public Utility Commission,

Defendants.

OPINION OF THE COURT

(Filed April 5, 1965)

Before Kalodner, *Circuit Judge,* and Sheridan and Follmer, *District Judges.*

Follmer, *District Judge.*

Plaintiff, hereinafter called "Railroad", is now and for many years last past has been a Pennsylvania corporation engaged as a common carrier in the transporta-

tion of persons and property by railroad in interstate commerce between the Cities of Harrisburg, Pennsylvania, and Hagerstown, Maryland. Its principal office is in Philadelphia, Pennsylvania.

Defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Dorris, hereinafter called "Commissioners", are now and for many years last past have been the duly appointed, qualified and acting members of the Pennsylvania Public Utility Commission, hereinafter called "P.U.C.", and said Commissioners are citizens and residents of the Commonwealth of Pennsylvania.

Railroad herein seeks injunctive relief restraining and enjoining the said Commissioners personally, and in their official capacities as Commissioners as aforesaid, from enforcing certain Orders of said P.U.C., and commanding said Commissioners to revoke and withdraw the said Orders of said P.U.C. and to dismiss the Rule to Show Cause issued upon Railroad.

The parties, Railroad and Commissioners, filed a paper entitled "Case Stated" in which it averred:

> "It is agreed by the parties that Your Honorable Court can make all of its findings of fact in this case from the within 'Case Stated' and the exhibits attached thereto. Any party is free to urge upon the Court any findings of fact based upon the within 'Case Stated' and the exhibits attached hereto."

Since the facts and documents involved are not in dispute, the parties have submitted this "Case Stated" to avoid the necessity of trial.

Appendix "A"

A three-judge court was convened in pursuance to 28 U.S.C. § 2281. Briefs were filed and an argument was held.

From the aforesaid "Case Stated" it appears that,

On August 9, 1962, Railroad instituted a suit in this Court to enjoin P.U.C. from enforcing its Order of July 9, 1962, requiring Railroad to restore and maintain service on its trains Nos. 638 and 645 operating between the City of Harrisburg and the Pennsylvania-Maryland boundary line.

Suit was instituted in this Court under the Act of Congress of June 25, 1948, Chapter 646, 62 Stat. 931, 28 U.S.C. §1337, and the Act of Congress of August 12, 1958, P.L. 85-625, Section 5, 72 Stat. 571, commonly known as the Transportation Act of 1958 and incorporated into the Interstate Commerce Act as Part I, 49 U.S.C. § 13a(1).

The suit had its origin in an application filed by Railroad on November 29, 1960, before the P.U.C., seeking approval of its proposal to discontinue passenger train service of its said trains Nos. 638 and 645 operating daily between Harrisburg, Pennsylvania, and Hagerstown, Maryland.

Protests were filed and after hearings were held, the P.U.C. denied the application on August 7, 1961. No appeal was taken from this Order in accordance with Section 1112 of the Pennsylvania Public Utility Law, 66 P.S. § 1442.

On January 25, 1962, Railroad filed with Interstate Commerce Commission, hereinafter called "I.C.C.", a "Notice of Proposed Discontinuance of Service" under the provisions of Section 13a(1) of the Interstate Commerce

Act, supra. Railroad also filed with I.C.C. a "Statement in Relation to the Proposed Discontinuance of Interstate Passenger Trains 638 and 645" as required by regulations of I.C.C., and in other respects complied with Section 13a(1) and regulations aforesaid applicable thereto.

The said Notice of January 25, 1962, supra, recited that the said trains served one station in Maryland and four stations in Pennsylvania. The Notice also recited, "that persons desiring to object to the proposed discontinuance should promptly notify the Interstate Commerce Commission at Washington, D.C., of such objection and the reasons therefor, before February 11, 1962." The Notice indicated that the proposed discontinuance would be effective February 25, 1962.

Protests were filed with the I.C.C. On February 8, 1962, P.U.C. mailed to I.C.C. a protest in the nature of a Petition to Intervene. On February 13, 1962, the P.U.C. received a notice from the I.C.C. dated February 8, 1962, and bearing service date of February 12, 1962. This Notice announced that the I.C.C. would not enter upon an investigation of the proposed discontinuance of Railroad's trains Nos. 638 and 645.

Requests for reconsideration of this decision were denied by the I.C.C. by Order dated March 23, 1962.

On February 20, 1962, P.U.C. issued upon Railroad a Rule to Show Cause why Railroad should not comply with P.U.C.'s Order of August 7, 1961. Within the fifteen day period allowed for answer, Railroad filed its answer on February 27, 1962, alleging that under Section 13a(1) it validly and properly discontinued passenger service on its trains Nos. 638 and 645, as of February 25, 1962.

Appendix "A"

P.U.C. set its Rule to Show Cause down for hearing on April 6, 1962, at Philadelphia, where the facts above stated were educed.

On July 9, 1962, P.U.C. issued its Order making the Rule to Show Cause absolute and ordered Railroad to restore and continue service as required by its prior Order of August 7, 1961.

Railroad did not appeal this Order of July 9, 1962 to the Superior Court of Pennsylvania, as provided by Section 1101, 66 P.S. § 1431 et seq.

On August 9, 1962, Railroad filed its Complaint in this Court, alleging that P.U.C.'s Order of July 9, 1962 was unlawful and issued in defiance of Section 13a(1) of the Transportation Act of 1958 and of the Railroad's rights thereunder; that it acted lawfully under the authority of Section 13a(1) in discontinuing the said trains; that by virtue of certain provisions of the Pennsylvania Public Utility Law it and its officers and employees would be subject to certain sanctions and substantial expense for train crews and operating costs if it had to run the said trains.

On August 24, 1962 P.U.C. moved to dismiss the Complaint on grounds of res judicata, full faith and credit and comity. The Court (Follmer, J.) holding that at that time it could not be said Railroad's Complaint had not set forth a cause of action which called for relief, especially in the light of the opinion of the three-judge court in this district in the case of Sludden, et al. v. United States of America, et al., D.C., 211 F. Supp. 150, denied the motion.

P.U.C. answered and on May 8, 1964, in accordance with the provisions of 28 U.S.C. § 2403 and Rule 24 of the Federal Rules of Civil Procedure, the Court ordered that it should be certified to the Attorney General of the United States that the case draws into question the constitutionality of Section 13a(1) of the Interstate Commerce Act, and further ordered that the United States, if it so desired, might intervene in the cause and to plead or answer as it may be advised.[1] Thereafter the three-judge court was set up.

This same three-judge court in a proceeding involving the identical facts of this case held that Section 13a(1) of the Interstate Commerce Act as amended in 1958, 49 U.S.C. § 13a(1), is constitutional and deprives neither the State or any individual of any right which the Constitution of the United States guarantees, Sludden, et al. v. United States, et al., supra. See also, State of New Jersey, et al., v. United States, et al., D.C.N.J., 168 F. Supp. 324 (1958); aff. per curiam 359 U.S. 27, 79 S. Ct. 603, 3 L. Ed. 2d 625 (1959). P.U.C.'s insistence that the New Jersey case was distinguishable from the instant case in that the former was exclusively interstate while the latter was both interstate and intrastate was duly considered by the Court in Sludden.

We adhere to the conclusion expressed in Sludden that Section 13a(1) is constitutional. While in view of our conclusion as to this Act's constitutionality it would

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[1] Under date of September 2, 1964 the United States Department of Justice advised the Clerk of this Court that in its opinion Section 13a(1) aforesaid is constitutional and it saw no reason to intervene.

seem no further discussion thereon is necessary, it might, however, be well to call attention to a few very pertinent facts.

1. By this Act it is clear that Railroad had its option to have I.C.C. rather than P.U.C. pass upon discontinuance of the said trains.

2. It is implicit in the Act that the I.C.C. had the right to act definitively by mere inaction. As stated in Sludden, supra, "(2) unless the Commission acts, the carrier may discontinue or change the service in accordance with the notice, 'the laws or constitution of any State, or the decision or order of, *or the pendency of any proceeding* before, any court or State authority to the contrary notwithstanding'".[2] (Emphasis supplied.)

3. The action of I.C.C. in concluding not to institute an investigation into a proposed discontinuance of train service is committed to the exclusive discretion of I.C.C. and is not subject to judicial review.

4. As stated in Sludden, supra, protests were filed with I.C.C., after which it did make a determination.

5. Exclusive dominion of this matter is vested by Congress in I.C.C., Sludden, supra; State of Colorado v.

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[2] To permit a State order affecting intrastate transportation that would be in contravention of an I.C.C. order affecting interstate transportation would be completely repugnant to the basic purpose of Section 13a(1) as shown by its legislative history. (See Sludden, supra, also New Jersey v. New York, Susquehanna & Western Railroad Co., 372 U.S. 1, 83 S. Ct. 614, 9 L. Ed. 2d 541 (1963)).

United States, et al., 271 U.S. 153, 165, 46 S. Ct. 452, 70 L. Ed. 878 (1926).[3]

Now that the case is fully before the Court on the basis of the "Case Stated", P.U.C. feels that the time is now ripe to review its motion for dismissal on the basis of res judicata, full faith and credit and comity.

When on January 24, 1962 Railroad submitted this matter to I.C.C. under Section 13a(1) jurisdiction over the continuance or discontinuance of the trains was vested exclusively in I.C.C. P.U.C.'s Order of July 9, 1962 was therefore completely abortive. Accordingly, the P.U.C. Order of July 9, could not on any theory be res judicata and I.C.C. was under no obligation to give full faith and credit to P.U.C.'s invalid Order. Berkman v. Ann Lewis Shops, D.C.S.D. N.Y., 142 F. Supp. 417 (1956); Illinois Central R. R. v. Mississippi Pub. Serv. Comm., D.C.S.D. Miss., 135 F. Supp. 304 (1955); Hanson v. Denckle, 357 U.S. 235, 255, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

Finally, as to comity, this Court is fully conscious of the desirability of maintaining the delicate balance between State and Federal authority. However, we feel that comity is not at issue in this case. There are no factual issues nor any issue of State law here involved. The only issue raised in this case is the constitutionality of a Federal statute. We have found the act in question constitutional.

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[3] The fallacy of P.U.C.'s position becomes evident when one considers the chaos that would result in interstate commerce if each State crossed by an interstate line passing through a number of States could by its actions prevent discontinuance of such line within its borders and thus negate I.C.C. regulations covering the entire line.

Appendix "A"

Plaintiff Railroad is entitled to a permanent injunction enjoining defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Dorris, individually and as Commissioners of the Pennsylvania Public Utility Commission, together with the successors of each of them, and their agents, servants and attorneys, from pursuing any of the remedies by mandamus, injunction, fine or imprisonment provided in the Pennsylvania Public Utility Act, or otherwise, for the purpose of compelling plaintiff, Railroad, to reinstate its trains Nos. 638 and 645 operating between the City of Harrisburg and the Pennsylvania-Maryland boundary line, pursuant to the provisions of the Pennsylvania Public Utility Act and said P.U.C.'s Order of July 9, 1962.

ORDER

NOW, April 5, 1965, in accordance with Opinion this day filed, it is Ordered and Decreed that Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Dorris, individually and as Commissioners of the Pennsylvania Public Utility Commission, together with the successors of each of them, and their agents, servants and attorneys, be and they are hereby permanently enjoined from pursuing any of the remedies by mandamus, injunction, fine or imprisonment, provided in the Pennsylvania Public Utility Act, or otherwise, for the purpose of compelling plaintiff, the Pennsylvania Railroad Company, to reinstate its trains Nos. 638 and 645

operating between the City of Harrisburg and the Pennsylvania-Maryland boundary line.

Harry F. Kalodner
United States Circuit Judge

Michael H. Sheridan
United States District Judge

Frederick V. Follmer
United States District Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 7810

The Pennsylvania Railroad Company,

Plaintiff

v.

Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Dorris, Individually and as Commissioners of the Pennsylvania Public Utility Commission,

Defendants.

OPINION OF THE COURT

(Filed March 20, 1963)

Follmer, *District Judge.*

This is a motion by defendants to dismiss the above stated action.

Plaintiff is The Pennsylvania Railroad Company (hereinafter referred to as "Railroad"), a Pennsylvania corporation with its principal office in the City of Phila-

delphia, Pennsylvania. The defendants are Joseph Sharfsin. P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara, and John L. Doris, individually and as Commissioners of the Pennsylvania Public Utility Commission (hereinafter referred to as "P.U.C.").

The Complaint sets forth, inter alia:

1. that the suit arose under the Act of Congress approved June 25, 1948, c. 646, 62 Stat. 931, 28 U.S.C. § 1337, and the Act of Congress regulating commerce approved August 12, 1958, Pub. L. 85—625, § 5, 72 Stat. 571, otherwise known as the Transportation Act of 1958 and as Section 13a(1) of the Interstate Commerce Act, Part I, 49 U.S.C. § 13a(1);

2. that Railroad, prior to February 25, 1962, operated two passenger trains, in interstate commerce, designated Nos. 638 and 645, between the cities of Harrisburg, Pennsylvania and Hagerstown, Maryland;

3. that Railroad, on November 28, 1960, filed an application with the P.U.C. at Application Docket 87818 seeking permission to discontinue, within the Commonwealth of Pennsylvania, the operation of the aforesaid passenger trains;

4. that the P.U.C., after public hearings, denied Railroad's application by its Order of August 7, 1961. No appeal was taken from that Order;

5. that Railroad, on January 25, 1962, filed with the Interstate Commerce Commission a "Notice of Proposed Discontinuance of Service" under authority of Section 13a(1) of the Interstate Commerce Act and filed with the Interstate Commerce Commission a "Statement in Relation

to the Proposed Discontinuance of Interstate Passenger Trains 638 and 645" as required by the regulations of the Interstate Commerce Commission;

6. that the Interstate Commerce Commission, on February 12, 1962, released a Notice of its conclusion not to enter upon an investigation of the proposed discontinuance of Railroad's passenger trains No. 638 and No. 645;

7. that the P.U.C., on February 20, 1962, issued upon Railroad a Rule to Show Cause why Railroad should not comply with the Order of the Commission of August 7, 1961;

8. that Railroad, on February 25, 1962, discontinued the operation of passenger trains No. 638 and No. 645 pursuant to its Notice of January 25, 1962, and under authority of Section 13a(1) of the Interstate Commerce Act aforesaid;

9. that the P.U.C., after argument on the Rule to Show Cause issued upon Railroad, by its Order of July 9, 1962, made the Rule to Show Cause absolute and ordered Railroad to restore and continue to maintain service as required by the Order of the P.U.C. of August 7, 1961. The said Order of July 9, 1962, was unlawful and issued in defiance of Section 13a(1) of the Transportation Act of 1958 and of Railroad's rights thereunder. The P.U.C. purported to justify its said Order on the ground that Section 13a(1) aforesaid was unconstitutional;

10. that the Order of the P.U.C. requiring Railroad to restore to service passenger trains No. 638 and No. 645 was beyond the jurisdiction of the Commission. By virtue

of Section 13a(1) of the Transportation Act of 1958, supra, and the action of the Railroad pursuant thereto, jurisdiction over the said trains No. 638 and No. 645 was vested solely and exclusively in the Interstate Commerce Commission. Furthermore, the P.U.C. has no power or authority to declare unconstitutional or otherwise refuse to be bound by an Act of Congress regulating Interstate commerce;

11. that Railroad has acted lawfully, under authority of Section 13a(1) aforesaid, in discontinuing the operation of its passenger trains No. 638 and No. 645 and in omitting to restore said trains to service. Although Railroad believes and avers that the action of the P.U.C. and its Order of July 9, 1962 is unlawful, nevertheless, Railroad would be subject, to the imposition of penalties under authority of the Act of Assembly approved May 28, 1937, P. L. 1053, Article XIII, Section 1301, 66 P.S. § 1491, at the rate of $50.00 for each day in which it fails to obey the aforesaid Order, if the said Order of the P.U.C. is lawful. Railroad, its officers and employees, would further be subject, under authority of the Act of Assembly approved May 28, 1937, P. L. 1053, Article XIII, Section 1302, 66 P.S. § 1492, to criminal prosecution entailing possible penalties of $500.00 and imprisonment for one year for Railroad's failure to obey the aforesaid Order of the P.U.C. if said Order is lawful;

12. that the enforcement of the Order of the P.U.C. issued July 9, 1962, restoring passenger trains No. 638 and No. 645 to operation, would unlawfully and irrevocably deprive Railroad of its property, since Railroad would be put to enormous expense for train crews, operating equipment and other necessary costs at a net expense to it of

many thousands of dollars and would deprive Railroad of the major savings made possible by the discontinuance of said trains;

13. that plaintiff has no adequate remedy at law for the wrong complained of.

The Complaint prayed the Court to,

"(a) issue its Order restraining and enjoining the Defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, personally, and in their official capacities as Commissioners of the Pennsylvania Public Utility Commission, and their successors in office, from enforcing the Order of the Pennsylvania Public Utility Commission of July 9, 1962, or imposing any penalties, civil or criminal, for non-compliance therewith;

"(b) command and compel the Defendants, Joseph Sharfsin, P. Stephen Stahlnecker, Robert W. Anthony, William F. O'Hara and John L. Dorris, to revoke and withdraw the Order of the Commission issued July 9, 1962, and dismiss the Rule to Show Cause issued upon Plaintiff, on February 20, 1962; and

"(c) grant unto Plaintiff such other relief as equity and justice may require."

The Motion to Dismiss is predicated on the following reasons:

1. The Court should, in its discretion as a Court in equity and for the reasons of comity, decline to exercise its jurisdiction invoked by Railroad.

2. The Order of the P.U.C., unappealed from is entitled to full faith and credit under Article IV, Section 1 of the United States Constitution; Act of June 25, 1948, 62 Stat. 947, 28 U.S.C. § 1738 and 28 U.S.C. § 1739.

3. In the event that the doctrine of "full faith and credit" is held to be inapplicable, the Complaint should be dismissed on the ground of res judicata.

In support of their first reason (comity) defendants state:

(a) That on February 20, 1962, P.U.C. issued upon Railroad a Rule to Show Cause why it should not comply with the P.U.C. Order of August 7, 1961, requiring Railroad to maintain service between the City of Harrisburg and the Pennsylvania-Maryland boundary line. On February 27, 1962, Railroad answered the Rule and raised the question of supremacy of the Federal Transportation Act of 1958 concerning Section 13a(1) of that Act, 49 U.S.C. § 13a(1). On April 6, 1962, a hearing was held at which Railroad appeared through its counsel and stipulated to the facts in controversy, again raising the question of Federal supremacy under the said Federal Transportation Act of 1958. On July 9, 1962, P.U.C. issued its Order, served upon the Railroad on July 11, 1962, rejecting the arguments of Railroad.

(b) Railroad was properly before P.U.C. concerning the question of discontinuance of intrastate transportation, in fact Railroad had invoked the jurisdiction of P.U.C. by filing its application before P.U.C. on November 29, 1960.

(c) Under the Act of May 28, 1937, P. L. 1053, Section 1101, 66 P.S. § 1431, an aggrieved party must appeal an Order of P.U.C. to the Superior Court of Pennsylvania within thirty days after service of the Order.

(d) Under the Public Utility Law, to which the Railroad was subject in its litigation before the P.U.C., the Railroad was required to file an appeal to the Superior Court within thirty days from the service of the P.U.C. Order of July 9, 1962. Had this been done, the further appellate procedure before the Supreme Court of Pennsylvania and ultimately before the Supreme Court of the United States would have been available.

(e) The regulation of intrastate transportation between points in Pennsylvania is based upon predominantly local factors, and the federal questions raised by the Railroad were considered fully by P.U.C. in its Order of July 9, 1962, and had proper appeal been taken undoubtedly would have been considered fully by both the State Superior Court, State Supreme Court and United States Supreme Court.

In support of their second reason (full faith and credit), defendants state:

(a) The federal questions raised by the Railroad were fully discussed and overruled by the P.U.C. Railroad elected not to appeal the Order of P.U.C. of July 9, 1962, but instead elected to permit the Order of P.U.C. to become final.

(b) Under the provisions of Section 1112 of the Public Utility Law (66 P.S. § 1442) the Order of

P.U.C. is conclusive upon the Railroad, admittedly a party to the proceeding and subject to the jurisdiction of P.U.C., which the Railroad had initially invoked. Under the law of Pennsylvania, Railroad is not at liberty to question the validity of the Order of P.U.C. from which no appeal was taken. By federal statute, 28 U.S.C. § 1738, all courts in the United States must give to such an order the same faith and credit as such order would have in the Courts of Pennsylvania.

(c) Because the effect of Railroad's failure to appeal Order of P.U.C. of July 9, 1962 is res judicata of the matters properly before the P.U.C., Complaint should be dismissed as an attempt to relitigate the issues which were litigated to a finality in Pennsylvania.

In support of their third reason (res judicata) defendants state:

In the event the Court determines that the full faith and credit clause does not apply to the orders and decrees of the P.U.C., nonetheless the Order of P.U.C. being unappealed from and involving same subject matter, same parties, same issues and same interests must be held to be res judicata.

A time schedule is set forth in the margin setting forth in chronological order the various steps taken in connection with the efforts of Railroad to discontinue the operation of two of its trains engaged in an interstate service between Harrisburg, Pennsylvania and Hagerstown, Maryland.[1]

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[1] Nov. 28, 1960, Railroad applied to P.U.C. for leave to discontinue passenger train service between Harrisburg and Pennsyl-

Appendix "B"

From this schedule it will be noted that Railroad initially sought its relief from P.U.C. That upon failing here and without appealing, it sought relief under the

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vania-Maryland boundary line (intrastate portion of this run).

Aug. 7, 1961, P.U.C. denied Railroad's application of Nov. 28, 1961.

Jan. 25, 1962, Railroad filed notice of its intention to discontinue (effective February 25, 1962) the operation of trains No. 638 and No. 645 operating daily between Harrisburg, Pennsylvania and Hagerstown, Maryland, under Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1), etc.

Feb. 8, 1962, I.C.C. determined not to enter upon an investigation of the proposed train discontinuance.

Feb. 15, 1962, Time for I.C.C. to object expired.

Feb. 20, 1962, P.U.C. issued rule on Railroad To Show Cause why the service in question should not be continued and enjoining Railroad from discontinuing intrastate portion of run until further order of P.U.C.

Feb. 25, 1962, Thirty day notice period under 49 U.S.C. §13a(1) expired and Railroad discontinued the operation of trains No. 638 and No. 645 over the entire interstate route, i.e., Harrisburg, Pennsylvania to Hagerstown, Maryland.

Feb. 27, 1962, Railroad filed Answer to Rule of P.U.C. averring it had applied to I.C.C. under 49 U.S.C. §13a(1), and that because of failure of I.C.C. to enter upon an investigation, Railroad became authorized to discontinue the trains in question.

Mar. 23, 1962, I.C.C. dismissed requests for reconsideration of its decision not to enter upon an investigation of the proposed train discontinuance.

July 9, 1962, P.U.C. reaffirmed its Order of August 7, 1961, and ordered Railroad to resume and continue the passenger service in question which Railroad had abandoned on February 25, 1962.

Aug. 8, 1962, Railroad filed instant suit against P.U.C. seeking (a) to restrain and enjoin P.U.C. from enforcing its Order of July 9, 1962, or imposing any sanctions for noncompliance; (b) an Order compelling P.U.C. to revoke its Order of July 9, 1962 and to dismiss the Rule To Show Cause issued Febduary 20, 1962.

Interstate Commerce Act. Then followed a series of conflicting imponderables: on the one hand, definitive orders of the P.U.C.; on the other hand, failure to enter upon an investigation in accordance with the provisions of the Interstate Commerce Act, which failure in and of itself, under the terms of the said Act, vested certain rights in Railroad. Availing itself of the rights thus acquired under the Federal statute, Railroad discontinued the complete interstate operation of the two trains only to find itself faced with the Order of the State regulatory body to resume and continue the intrastate movement of the two trains. Failure to comply with the latter Order automatically subjects Railroad to the sanctions, civil and criminal, of the pertinent Pennsylvania statute, to wit: Act of May 28, 1937, P. L. 1053, art. XIII, §§1301 and 1302, 66 P.S. §§1491 and 1492. Here again with respect to P.U.C. Order of July 9, 1962 (to resume and continue operations), Railroad failed to appeal as it had previously

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its Order of July 9, 1962, or imposing any sanctions for noncompliance; (b) an Order compelling P.U.C. to revoke its Order of July 9, 1962 and to dismiss the Rule To Show Cause issued February 20, 1962.

Sept. 10, 1962, Hearing before Three Judge Court In re: Sludden, et al. v. United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company, D.C.M.D. Pa., Civil Action No. 7680, Opinion filed November 29, 1962, 211 F. Supp. 150. The action sought to set aside alleged actions of I.C.C. taken on February 8, 1962 and March 23, 1962. The suit was by various labor organizations against I.C.C. and involved the same facts as the instant case, however, P.U.C. was not a party. The Opinion held that Section 13a(1) of the Interstate Commerce Act, 49 U.S.C. §13a(1), is constitutional and granted motions of the United States of America, Interstate Commerce Commission and The Pennsylvania Railroad Company to dismiss the Complaint.

failed to appeal the P.U.C. Memorandum of August 7, 1961 denying Railroad's original application to discontinue.

From the foregoing it cannot be said at this time that Railroad in its Complaint has not set forth a cause of action which calls for relief, especially in the light of the Opinion of the Three Judge Court in this District in the case of Sludden, et al. United States of America, et al., supra, which Opinion was written by the writer of the instant Opinion and of which this Court presently takes judicial notice.

I do not feel that the various issues raised by defendants in their Motion To Dismiss, to wit: comity, full faith and credit, and res judicata, are matters which call for consideration, much less extended discussion, in the present posture of the case, to wit: on the Motion To Dismiss.

Accordingly, defendants' Motion To Dismiss will be denied.

ORDER

NOW, March 20, 1963, in accordance with Opinion this day filed, it is Ordered and Decreed that Defendants' Motion to Dismiss be and the same is hereby denied.

Frederick V. Follmer
United States District Judge

SUPREME COURT, U. S.

No. 375

Office-Supreme Court, U.S.
FILED
AUG 19 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JOSEPH SHARFSIN, P. STEPHEN STAHLNECKER, ROBERT W. ANTHONY, WILLIAM P. O'HARA, and JOHN L. DORRIS, INDIVIDUALLY AND AS COMMISSIONERS OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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August 1965

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

The Appellee, pursuant to Rule 16, paragraph 1(c), moves that the judgment of the District Court be affirmed on the ground that the questions presented are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Middle District of Pennsylvania enjoining the The Pennsylvania Public Utility Commission ("the PUC") from enforcing an order dated July 9, 1962, requiring The Pennsylvania Railroad Company to restore, within the state, service previously provided by two interstate passenger trains which the Railroad had discontinued pursuant to the provisions of Section 13a(1) of the Transportation Act of 1958 (49 U.S.C. 13a(1)). The order of the PUC was based on the ground that Section 13a(1) was unconstitutional.[1]

Prior to February 1962 the Railroad operated two passenger trains, numbers 638 and 645, over its line between Harrisburg, Pennsylvania, and Hagerstown, Maryland. The trains served primarily as a link in the company's through service between New York and Roanoke, Virginia, via Harrisburg. The two trains, which operated during the middle of the night, stopped enroute at three small towns in Pennsylvania. Of the approximately 20 passengers using each train each day a great majority were through passengers. Of the remaining local passengers only one or two used the trains each day for travel between points in Pennsylvania.

In November 1961 the Railroad filed with the PUC an application for leave to discontinue trains 638 and 645 in Pennsylvania. In support of the application the Railroad offered proof that it proposed to provide service for the majority of the passengers by re-

[1] Section 13a(1) is set forth in full in the Appendix to this motion.

routing a through sleeping car via Washington, that alternative methods of transportation were available for the small number of local passengers, and that the discontinuance of the two trains would result in substantial savings to the Railroad.[2]

The PUC denied this application on August 7, 1961. The Railroad did not seek judicial review of the denial in the state courts.

On January 25, 1962, the Railroad, acting pursuant to the provisions of Section 13a(1) of the Transportation Act of 1958 filed with the Interstate Commerce Commission notice of its intention to discontinue the operation of trains 638 and 645, on February 25, 1962. In accordance with the requirements of the statute the notice was filed 30 days in advance of the date that the proposed discontinuance would become effective. Notice of the proposed discontinuance was given to the public and to the PUC in the manner required by the statute. The Railroad also furnished the Interstate Commerce Commission and PUC information as to the patronage of the trains, alternative services, revenues, expenses and other information as required by the applicable Interstate Commerce Commission regulations.

Under the provisions of Section 13a(1) the Interstate Commerce Commission was authorized, in its

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[2] The figures referred to in footnote 3, page 16, of the Jurisdictional Statement do not accurately reflect the revenue situation. The revenue figure of $202,162 used in the footnote includes revenue which the Railroad expected to retain by reason of rerouting the through service. The Railroad's evidence before the PUC balanced the savings expected against the estimated loss of revenue, taking into account revenues to be retained from the rerouted through service, and showed that discontinuance of the two trains would result in savings of $55,000 a year.

discretion, at any time within the 30 day notice period to enter upon an investigation of the proposed discontinuance. The Interstate Commerce Commission was also authorized if it instituted an investigation, to suspend the proposed discontinuance, for a period not to exceed 4 months, by serving an order upon the Railroad at least 10 days prior to the date on which the discontinuance would otherwise have become effective.' If the Commission instituted an investigation it was authorized to require the continuance or restoration of service if it found, after hearing, that the service was required by the public convenience and necessity and would not unduly burden interstate or foreign commerce.

On February 8, 1962, the PUC sent to the Interstate Commerce Commission a formal protest against the proposed discontinuance.[3] The Commission, however, elected not to exercise its authority to institute an

[3] In its Jurisdictional Statement (p. 11) the PUC refers to the fact that the Interstate Commerce Commission issued a notice of its decision not to enter upon an investigation on February 8, 1962, the same date that the PUC sent its protest to the Commission. The fact is, however, that the Commission could have instituted an investigation into the proposed discontinuance at any time prior to February 25, 1962. If it had determined to institute an investigation it could have suspended the proposed discontinuance for a period of 4 months by a notice served upon the Railroad at any time prior to February 15, 1962. In its opinon dated July 9, 1962, the PUC said:

> "While we take exception to the premature decision of the Interstate Commerce Commission in these circumstances, we shall assume that it did consider our protest as well as the others, and that had it seen fit to rescind its order it would have done so between February 11 and February 15, 1962, during which period it did have the authority to order a suspension."

investigation or to suspend the proposed discontinuance. Consequently under the terms of the statute the Railroad was entitled to discontinue the two trains on February 25, 1962, and it did so.

On February 20, 1962, the PUC issued a rule requiring the Railroad to show cause why it should not maintain within the state the service provided by the two trains as required by the PUC order of August 7, 1961. The Railroad responded by contending that the trains had been discontinued in strict compliance with the provisions of Section 13a(1) of the Transportation Act of 1958 and that as a result the PUC no longer had authority to require the continuance of the service provided by the trains. The PUC rejected this contention on the ground that Section 13a(1) as so applied was unconstitutional and by an order dated July 9, 1962, again ordered the Railroad to continue the service provided by the two trains within the state of Pennsylvania. The Railroad did not seek judicial review of this order in the state courts.

On August 9, 1962, the Railroad filed its complaint in the court below seeking to enjoin the members of the PUC from enforcing the order of July 9, 1962, referred to above. The PUC defended primarily on the ground that Section 13a(1) was unconstitutional and also argued that its order of July 9, 1962 was *res judicata* and entitled to full faith and credit or, in the alternative, that the federal court should decline jurisdiction for reasons of comity. The case was heard by a three-judge district court convened pursuant to

28 U.S.C. 2281.[4] In an opinion filed on April 5, 1965, the court below rejected the contentions of the PUC and on the same date entered a judgment granting the injunctive relief prayed for.[5]

ARGUMENT

I. There Is No Substance in Appellants' Constitutional Arguments

Appellants contend that Section 13a(1) is unconstitutional as applied to the circumstances in this case because it "imposed supercession of a State Order over intrastate commerce upon the mere filing of notice by

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[4] In accordance with the provisions of 28 U.S.C. 2403 and Rule 24 of the Federal Rules of Civil Procedure the court below certified to the Attorney General of the United States that the case drew into question the constitutionality of Section 13a(1) and ordered that the United States, if it so desired, might intervene. In a communication dated September 2, 1964, the United States Department of Justice advised the clerk of the court below that in its opinion Section 13a(1) is constitutional and that it saw no reason to intervene (Jurisdictional Statement, p. 31).

[5] On April 20, 1962, members of a legislative committee of the Railroad Brotherhoods of the State of Pennsylvania brought suit in the court below seeking to set aside the action of the Interstate Commerce Commission in determining not to enter upon an investigation of the proposed discontinuance of trains 638 and 645 and also seeking a judgment forbidding the Railroad from discontinuing the service provided by the two trains. The plaintiffs attacked the constitutionality of Section 13a(1) on substantially the same grounds advanced by the PUC here. The case was heard by a three-judge court which held that the action of the Commission in refusing to enter upon an investigation of the proposed discontinuance was not subject to judicial review since it was not an order within the meaning of 28 U.S.C. 1336 and that Section 13a(1) is constitutional and does not deprive the state or any individual of any right which the Constitution of the United States guarantees. The court granted the motions of the defendants to dismiss. See Sludden v. United States, 211 F. Supp. 150, 154, 156 (M.D. Pa. 1962). No appeal was taken from that decision.

the Railroad without any findings of an undue burden on interstate commerce." (Jurisdictional Statement, pp. 4, 13-20). This argument raises no constitutional question that deserves plenary consideration by this Court.

Long ago this Court held in *Colorado* v. *United States,* 271 U.S. 153, 161-162, 165-166 (1926), that the Commerce Clause gives Congress the power to authorize railroads engaged in interstate transportation to abandon facilities or operations involved in such transportation and that the abandonment may extend to intrastate as well as interstate traffic. There the Court held, over the objection of a state, that Congress could constitutionally authorize a railroad engaged in interstate operations to abandon, as respects both intrastate and interstate traffic, a branch line lying wholly within the state.[6]

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[6] Appellants' reliance upon Texas v. Eastern Texas R.R., 258 U.S. 204, is misplaced. That case raises no doubt as to the power of Congress to authorize a railroad engaged in interstate transportation to abandon intrastate operations as the subsequent decision of this Court in Colorado v. United States, 271 U.S. 153, shows. In the Texas case the lines of the railroad involved lay entirely within the state of Texas and it was "being operated independently, and not as a branch of any railroad engaged in interstate commerce." Colorado v. United States, 271 U.S. at p. 169. Some interstate traffic moved over the intrastate lines and the Court held that Congress could constitutionally authorize abandonment of this interstate traffic. Once the railroad had been authorized to abandon the carriage of interstate traffic the remaining intrastate operations were not related in any way to interstate transportation. In Colorado v. United States, 271 U.S. at pp. 169-170, the case was distinguished on this ground. Any constitutional doubts that may be raised by the Texas case relate to the power of Congress to authorize abandonment of intrastate operations by a railroad which carries no interstate traffic and conducts no interstate transportation operations of any kind. No issue of that kind is presented here.

The constitutional authority sustained in *Colorado* v. *United States, supra,* was the authority that Congress exercised when it provided in Section 13a(1) that a carrier may discontinue the operation of a train operating from a point in any one state to a point in any other state. As the decision in that case shows this constitutional authority extends to the intrastate as well as to the interstate segments of the train's operations.[7]

Appellants argue, however, that Section 13a(1) cannot be constitutionally applied to the intrastate segment of an interstate railroad operation in the absence of a specific finding that continuance of service on the particular intrastate segment involved will burden interstate commerce. In substance, as appellants recognize (Jurisdictional Statement, pp. 16-17), this is an argument that Congress cannot directly exercise its constitutional power to regulate intrastate activities that affect interstate commerce by passing a statute of general application but must, as a matter of constitutional law, delegate to an administrative agency the authority to determine case-by-case whether particular intrastate activities do in fact affect interstate commerce.[8] There is no substance in this argument.

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[7] It is obvious that the power of Congress over interstate railroad operations would be frustrated if every state through which an interstate train passes could require the railroad to maintain or to restore service on the segment of the line within its borders.

[8] Section 13a(1) is a direct exercise of Congressional authority; it permits a carrier to act "of its own initiative and without any prior authorization, either by Congress or by the Commission", subject only to the authority of the Interstate Commerce Commission to investigate and to defer the discontinuance if in the exercise of its discretion it decides to do so. State of New Jersey

Section 13a(1) is a determination by Congress itself that the refusal of state authority to permit discontinuance of intrastate service provided by interstate trains is an activity that affects or burdens interstate commerce.[9] As *Colorado* v. *United States,* 271 U.S. 153, shows this determination relates to subject matter that is within the reach of the Congressional power to regulate interstate commerce. This being so the Congressional determination is sufficient and the Constitution does not require Congress itself to make, or to authorize an administrative agency to make, findings with respect to specific instances in which the statute may be applied. Only last term in *Katzenbach* v. *McClung,* 379 U.S. 294, 302-303, this Court rejected a contention that when Congress exercises its power to regulate interstate commerce it is required to provide for a "case-by-case determination" that particular activity to which the statute applies affects commerce. In *United States* v. *Darby,* 312 U.S. 100, 120-121, this Court rejected a similar contention and

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v. United States, 168 F. Supp. 324, 331, 333 (D. N.J. 1958), *affirmed,* 359 U.S. 27.

In the cited case New Jersey made an argument not essentially different from appellants' argument here. The New Jersey argument, which relied upon the Due Process Clause of the Fifth Amendment rather than upon any inherent limitation in the Commerce Clause, was that it was unconstitutional for Congress to permit a railroad to discontinue service without providing for a full hearing before the Interstate Commerce Commission. The court rejected the argument. (*Id.* at pp. 330-332)

[9] See H.R. No. 1922, 85th Congress, 2d Session, pp. 11-12; S.R. No. 1647, 85th Congress, 2d Session, p. 22; and Report No. 2274 (Conference Report), 85th Congress, 2d Session, pp. 13-14. See the discussion of this aspect of the legislative history in State of New Jersey v. United States, 168 F. Supp. 324, 336 (D. N.J. 1959), *affirmed,* 359 U.S. 27. See also Southern Railway Co. v. North Carolina, 376 U.S. 93, 101.

held that if Congress itself has determined that an activity affects commerce, "the only function of the courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power."[10] And when the nature of the Congressional determination is disclosed by the legislative history of the statute the fact that Congress did not embody the determination in specific findings in the statute itself does not impair its validity. See *Katzenbach* v. *McClung,* 379 U.S. 294, 304, *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152.

The opinion of this Court in *Colorado* v. *United States,* 271 U.S. 153, itself answers appellants' argument. There the Interstate Commerce Commission, acting pursuant to Section 1, paragraphs 18-20, of the Interstate Commerce Act, had issued a certificate permitting the interstate carrier involved to abandon, both as to intrastate and interstate traffic, a branch line lying wholly within the state. Colorado attacked the Commission's order on the ground that it was not supported by essential findings and in that connection emphasized the absence of any finding that continuation of the instrastate aspect of the operation would result in discrimination against interstate commerce. This Court rejected that contention, holding that the sole test prescribed by the statute was that the abandonment be consistent with public necessity and convenience (271 U.S. at p. 168). The opinion makes it plain that findings were not a matter of constitutional

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[10] In the Darby case it was argued unsuccessfully that the Fair Labor Standards Act (29 U.S.C. 201, *et seq.*), was unconstitutional because it did not provide for an independent inquiry regarding the effect on interstate commerce of substandard wages in a particular business. See Katzenbach v. McClung, *supra,* at page 303.

necessity but were controlled entirely by the standards which Congress, in the exercise of its legislative discretion, had incorporated in the statute.[11]

Appellants make one additional constitutional argument which they rest on the Fifth Amendment. This argument is that Section 13a(1) violates the procedural requirements of the Due Process Clause because it gives the Railroad "unfettered discretion in deciding to abandon a line without any opportunity afforded the State for a hearing to contest the exercise of discretion" (Jurisdictional Statement, pp. 20-21).

Appellants have cited no decisions that provide even a shadow of support for the suggestion that the discontinuance of trains 638 and 645 pursuant to the provisions of Section 13a(1) infringed any rights of the PUC, the State of Pennsylvania or the citizens of Pennsylvania that are entitled to protection under the Fifth Amendment. Since Section 13a(1) imposes no limitation upon the right of appellants to resort to the courts their argument must be read as asserting that the statute is unconstitutional because it does not provide that appellants are entitled to a hearing before the Interstate Commerce Commission prior to discontinuance of service. Precisely this argument was made

[11] The Court said (271 U.S. at pp. 167-168):

> "While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use of intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate."

by New Jersey and rejected in *State of New Jersey* v. *United States,* 168 F. Supp. 324, 330-334, *affirmed,* 359 U.S. 27. Appellants have attempted to distinguish that decision on the ground that there no state order and no intrastate matter was involved (Jurisdictional Statement, pp. 18-19). Whatever relevance these differences might be thought to have in relation to the Commerce Clause they are of no significance under the Fifth Amendment. In relation to the power of Congress to regulate commerce the requirement of procedural due process imposed by the Fifth Amendment does not vary depending upon whether that power is exercised with respect to an interstate service as it was in New Jersey or with respect to the intrastate segment of interstate service as it has been here. Since denial of a full hearing before the Interstate Commerce Commission did not violate the Due Process Clause in the New Jersey case it cannot violate the Due Process Clause in the instant case. Appellants have shown no reason why this Court should depart from or overrule its prior decision.

II. There Is No Substance in Appellants' Contentions on Comity, Res Judicata and Full Faith and Credit

Appellants contend that the District Court should have declined jurisdiction for reasons of comity and remitted the Railroad to its remedies in the courts of Pennsylvania (Jurisdictional Statement, pp. 21-22).[12] Alternatively they argue that the decision of the PUC holding Section 13a(1) unconstitutional is conclusive

[12] In fact the time within which the Railroad might appeal the order entered by the PUC on July 9, 1962, has expired so that the Railroad now has no remedy in the state courts (Jurisdictional Statement, p. 23).

as against the Railroad by reason of the doctrines of *res judicata* and full faith and credit (*id.* at pp. 22-25).

These arguments are not entitled to serious consideration because they are inconsistent with both the purpose and the provisions of Section 13a(1). The terms of Section 13a(1) make it plain that Congress has preempted the regulatory field here involved and has explicitly deprived state agencies of the authority to act upon the subject matter of this litigation. The section provides that a notice of discontinuance of service may be filed by any carrier if its rights with respect to the discontinuance of service "are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State". It further provides that any carrier filing a notice may discontinue service pursuant to this notice, except as otherwise ordered by the Interstate Commerce Commission, the "laws or constitution of any State or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding." [13]

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[13] The effect of Section 13a(1) on state authority is made plain by the last two sentences of the section. They set forth certain conditions, not here applicable, in which it is provided that the statute "shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory agency of any State" and that the jurisdiction of the state "shall no longer be superseded". Since the specified conditions do not exist in the present case the effect of the section here is to supersede state authority.

In its opinion of July 9, 1962, the PUC itself said:

> "* * * we are impelled to the conclusion that Section 13(a)(1) of the Federal Transportation Act of 1958 does intend a supercession of all state law even as to the intrastate aspects of any given interstate train."

The legislative history of Section 13a(1), as well as its language, makes it clear that one of the purposes was to avoid delays in the discontinuance of burdensome passenger service which ensued when carriers were required to exhaust their remedies in the state courts.[14] To apply the doctrine of comity here would be inconsistent with this Congressional intent and would disregard an explicit Congressional direction.

Alabama Public Service Commission v. *Southern Railway Co.*, 341 U.S. 341, on which appellants primarily rely to support their comity argument is inapposite. That case was decided before the enactment of Section 13a(1) and has no application to the present situation in which the regulatory field has been preempted by Congressional action.[15]

Furthermore, in the Alabama case this Court described the controversy as one in which a federal court had been asked to intervene in resolving "an essentially local problem" that turned upon "predominately local factors" (341 U.S. at pp. 347, 349).[16] In contrast the sole issue in this case is the constitutionality of Sec-

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[14] See S.R. No. 1647, 85th Congress, 2d Session, pp. 21-22, H.R. No. 1922, 85th Congress, 2d Session, p. 12. See also footnote 9, p. 9, *supra*.

[15] In that case the Court noted that there was no federal regulatory statute that impaired "the primary authority" of the state to deal with the discontinuance of passenger service there involved (341 U.S. 341, 345-346). Here Congress has enacted a statute for the explicit purpose of permitting the discontinuance of service provided by interstate trains without resort to state authority.

[16] This Court pointed out that the posture of the case made it impossible to consider "any impact the order of Alabama Public Service Commission might have on interstate commerce." (341 U.S. at pp. 346-347; n. 9)

tion 13a(1) of the Interstate Commerce Act. This case does not turn on disputed issues of fact, on the construction of applicable state law, or on any of the other considerations that have led this Court in the past to decline jurisdiction for reasons of comity.

In *California Commission* v. *United States,* 355 U.S. 534, 539, this Court declined to apply the doctrine of comity in a case that involved the constitutionality of a state statute which would have deprived the federal government of the right conferred upon it by Section 22 of the Interstate Commerce Act to negotiate with common carriers special rates for the shipment of Government property. This Court said (355 U.S. at p. 539):

> "That issue is a constitutional one that the Commission can hardly be expected to entertain."

The fact that the PUC in this case has undertaken to declare a federal statute unconstitutional does not make the statement of the Court any the less applicable.

Appellants stand in no better position when they invoke the doctrines of *res judicata* and full faith and credit. Those doctrines are not applied in a federal court to a state decision if the subject matter of the litigation has been preempted by federal legislation. See *Durfee* v. *Duke,* 375 U.S. 106, 114, *Kalb* v. *Feuerstein,* 308 U.S. 433, 439-440.[17] And see also *United States*

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[17] Appellants attempt to distinguish Kalb v. Feuerstein, *supra,* on the ground that there the state court attempted to decide a matter *after* the bankruptcy court obtained jurisdiction (Jurisdictional Statement, p. 24). Appellants do not attempt to explain why this asserted distinction has any relevance to the question of federal preemption. In any event, the appellants are wrong on the facts. In the Kalb case the state foreclosure proceeding was begun before the petition in bankruptcy had been filed and approved. See 308 U.S. at pp. 435-36, n. 2.

v. *United States Fidelity Co.*, 309 U.S. 506, 514. As we have pointed out above, Section 13a(1) preempts the regulatory field here involved and deprives the state agencies of authority to act with respect to the discontinuance of intrastate service provided by interstate trains. To treat the decision of the PUC on the constitutionality of Section 13a(1) as *res judicata* and as entitled to full faith and credit would frustrate the provisions of the statute and nullify the public policy declared in those provisions.

Even apart from the question of preemption there is no merit in appellants' contention that the decision of a state administrative agency on the constitutionality of a federal statute can operate as *res judicata* or is entitled to full faith and credit in a federal court. Appellants cite no authority that supports this contention. In a line of decisions extending over 75 years this Court has held that one aggrieved by the order of a state administrative agency, may, in appropriate circumstances, resort to the federal courts for protection of a right arising under the Constitution and laws of the United States. There is no suggestion in any of these cases that the decision of a state administrative agency on a question of federal constitutional law could by reason of the doctrines of *res judicata* and full faith and credit operate as a bar to the relief sought. See for example, *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 227, *Bacon* v. *Rutland R.R. Co.*, 232 U.S. 134, *Prendergast* v. *N. Y. Telephone Co.*, 262 U.S. 43, *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Commission*, 279 U.S. 560.[18] And it

[18] In these cases the Court treated the question of *res judicata* as one that could arise only as a result of a decision by a state court i nthe exercise of its judicial function. See, for example, Prentis v. Atlantic Coast Line Co., *supra*, and also Railroad Commission v. Duluth Street Ry. Co., 273 U.S. 625, 627-628.

is significant that in *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U.S. 341, the Court did not base its decision on *res judicata* or full faith and credit, but rather held that the District Court should have declined jurisdiction "as a matter of sound equitable discretion" (*id.* at p. 350). There is no intimation in the opinion in that case that if the Court had decided, in the exercise of its equitable discretion, to accept jurisdiction, it would have regarded itself as bound by the decision of the Alabama Public Service Commission.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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August 1965

APPENDIX

DISCONTINUANCE OR CHANGE OF CERTAIN OPERATIONS OR SERVICES

SEC. 13a. [*August 12, 1958.*] [*49 U. S. C. § 13a.*] (1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months

beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 375

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellant

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellee

On Appeal from the United States District Court for the Middle District of Pennsylvania.

REPLY TO MOTION TO AFFIRM

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965
No.

Pennsylvania Public Utility Commission,
Appellant

vs.

The Pennsylvania Railroad Company,
Appellee

On Appeal from the United States District Court for the Middle District of Pennsylvania

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REPLY TO MOTION TO AFFIRM

I. APPELLEE CONFUSES "POWER" WITH "MANNER OF EXERCISE"

Appellee's basic misconception of our argument is that we deny the power to Congress to supersede State regulation. The Court below also misconstrued our position as evidenced by their footnote 3 (J.S. 33) where they shudder to think of the chaos that would result if each state could block the interstate discontinuance.

Before the Transportation Act of 1958 the Railroad had no method of going to the I.C.C. for the discontinuance

of an interstate line. If the train stopped two or more times in any one State, the Railroad had to apply to the particular State for permission to discontinue the line as to the stops within the State, if the State had such regulations. Before 1958, the Interstate Commerce Commission only had jurisdiction over "abandonments" which covered both passenger and freight service served by a train. Where only passenger service was discontinued, no I.C.C. approval was necessary.

The "chaos" that the Court below refers to that would result if the P.U.C.'s position was right, is the "chaos" that has been in existence from 1789 until 1958. Up till that time each state had the right to prevent the discontinuance of a train if it made more than one stop in the state so far as the station stops in that State were concerned.

In 1958, the Federal Government passed the Federal Transportation Act and sought to supersede state action by making it unnecessary for the Railroad to comply with State law if it followed the procedures set forth in §13a(1).

We have no quarrel with the "power" of the Federal Government to supersede State power. What we quarrel with by the Act is whether Congress has exercised its power in the manner required by the Constitution. **Has Congress determined itself or through its agency that state power over intrastate commerce in all cases is necessary to be superseded?**

This is the teaching of the *Shreveport* case and the many others following in its wake, including *Texas v. Eastern Texas R.R.*, 258 U.S. 204.

Appellee in footnote 6 claims that we have mistakenly relied upon the *Texas* case. Appellee states that in the

Texas case "*some* interstate traffic moved over the intrastate lines." This is a misquote. On page 214 of the Opinion, Mr. Justice Van Devanter states "Approximately three fourths of the traffic over the road is in interstate and foreign commerce and the rest is in intrastate commerce." Appellee then makes the nonsensical statement that "Once a railroad had been authorized to abandon the carriage of interstate traffic the remaining intrastate operations were not related in any way to intrastate commerce." Once any railroad abandons its interstate traffic, the remaining intrastate traffic, naturally, stands alone. The interstate traffic is gone; there can be no relation to it any more.

Appellee states that the "doubts" in the *Texas* case relate to abandonment of intrastate operations by a railroad which carries no interstate traffic and conducts no interstate transportation operations of any kind (Motion To Affirm, P. 7, fn 6). This statement is contrary to the facts as noted in the Opinion.

The decision of the United States Supreme Court in the *Texas* case is clear and simple. There, a railroad was engaged both in inter and intrastate commerce. The I.C.C. authorized abandonment of the line. The State of Texas thought that the I.C.C. had authorized abandonment of the intra as well as the interstate operations of the train. It therefore brought suit in the Federal Court to enjoin the railroad from discontinuing intrastate operations. The Federal Court dismissed the suit on the ground that the railroad had a right to discontinue intrastate operations based upon the I.C.C. certificate. The U.S. Supreme Court reversed, holding that the I.C.C. did not intend to cover the intrastate operations but only interstate operations, so that the railroad had to continue

operating in intrastate commerce. It said that the District Court had given the I.C.C. certificates a wider operation and effect than should be given to them. By thus delimiting the operation and effect of the I.C.C. certificate "a serious question" as the constitutional validity of the Transportation Act of 1920 was avoided.

Unfortunately, the doctrine of two constructions cannot intervene to save the present act from its constitutional collision. As indicated by Justice Van Devanter in the *Texas* case, the power to regulate intrastate commerce arises "only as that may be incidental to the effective regulation and protection of commerce of the other class [interstate commerce]." 258 U.S. at p. 217.

The Court in the *Texas* case noted that:

> "Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce." 258 U.S. at pp. 216-217.

The necessary nexus that must exist before State supersession can take place is also evidenced by *Colorado vs. U.S.*, 271 U.S. 153.

In the *Colorado* case, the I.C.C. had found that the branch line that was operating both in intrastate and interstate commerce was a part of the system, that "for years operation of the branch had resulted in large defi-

cits;" that "future operation would likewise result in large deficits"; "that the operating results of the branch are reflected in the Company's accounts; that it would have to make good the deficits incurred in operating the branch; and that thus **continued operation would constitute an undue burden upon interstate commerce.** Abandonment of Branch Line by Colorado & Southern Ry., 72 I.C.C. 315; 82 I.C.C. 310; 86 I.C.C. 393." 271 U.S. at p. 160.

If the **same type of findings** had been made in this case we would not be here. In that case the State of Colorado attacked the power of the I.C.C. The Supreme Court held that Congress has the power "to protect interstate commerce from undue burdens or discrimination." 271 U. S. 162.

The Court said:

"The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over **intrastate** commerce **only because** such control is a necessary incident of freeing interstate commerce from the **unreasonable burdens**, obstructions or unjust discrimination which are found to result from operating a branch at a large loss. . . .

"The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce **is similar** to that exerted when a State establishes **intrastate rates** so low that intrastate traffic does not bear its fair share of the cost of the service. (cases cited.) . . .

"The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in The Shreveport case, 234 U. S. 342, a power to pre-

vent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce."

"Each element essential to the exercise of that power" by the Commission or Congress must therefore appear. *N. C. v. U. S.*, 325 U. S. 507, 511.

Appellee misstates our argument that Congress cannot pass a statute regulating intrastate activities that affect interstate commerce. We make no such argument. However, Congress has not assumed the regulation of all intrastate railroad transportation by an interstate railroad. If it did, the Act would be similar to that in *U. S. v. Darby*, 312 U. S. 100 or *Wickard v. Filburn*, 317 U. S. 111, and the inquiry would be whether such all-inclusive regulation was reasonably necessary for the protection of interstate commerce.

But Congress has not seen fit to do that. Rather, Congress has left the matter of railroad discontinuance to a case by case basis when a railroad applies, in which case the I.C.C. may or may not suspend, and, after hearings, even require the continued operation of the line. There is therefore no all-inclusive regulation here, but rather one based upon the procedure taken in a case by case method.

What we are quarrelling with here is the procedure as exercised in this particular case. The *Colorado* case makes it clear that Congress' power in this area follows the *Shreveport* decision, that is, there must be a relationship to interstate commerce. Congress or its agency must determine so long as a case by case method is employed whether there is any adverse effect on interstate commerce if the interstate operation is continued.

(1) Appellee's Play on Words as to the Colorado Case

Since only under certain conditions can State power be superseded, those conditions must appear. As was said in *P.S.C. of Utah v. U. S.*, 356 U. S. 421, 425, the justification must clearly appear.

Appellee attempts to use the *Colorado* case to argue that jurisdictional findings are not necessary. How it concludes this from the *Colorado* case is a play upon words. In the *Colorado* case the State was arguing that certain types of findings should have been made, namely:

> (1) that by continued operation of the branch interstate or foreign commerce will be discriminated against, or
>
> (2) that the Company will be prevented from earning a fair return on the value of its properties as a whole, or
>
> (3) that the entire intrastate business in Colorado will not earn such a return upon the property used in conducting that business.

The Court said that the I.C.C. did not have to make findings in order to make its decision so long as it made a **finding** that the "abandonment be consistent with public necessity and convenience." The Court then went on to say:

> "In determining whether it is, the Commission must have **regard** to the needs of both intrastate and interstate commerce. . .
>
> "The benefit to one of the abandonment must be weighed against the inconvenience and loss to which

the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. [Citation omitted.] The result of this weighing—the judgment of the Commission—**is expressed by** its order granting or denying the certificate."

The Appellee therefore attempts to argue that when the Court said that the particular findings as phrased by the State did not have to be made, as such, it was saying that no findings had to be made. Nothing could be further from the truth. Findings have to be made to justify the conclusion that public convenience and necessity require the abandonment. In fact, the Court said,

> ". . . the fact of demonstrated prejudice to interstate commerce and the absence of earnings to afford reasonable compensation are, of course, **relevant and may often be controlling.** But the Act does not make issuance of the certificate dependent upon a specific finding to that effect."

All these factors therefore have to be considered and the Commission is charged with making an ultimate finding as to what public convenience requires after **considering** all these things. And that finding must be supported by the evidence. In fact, in that case, the Court said:

> "An examination of the extensive record and of the three opinions of the Commission convinces us that no relevant fact was ignored, that there was **ample evidence** to support the **facts found.** . . ." (Emphasis supplied.)

In the *Colorado* case you therefore have a case where full hearings were afforded, full findings made as to the

effect the intrastate operations would have on the interstate operation, all leading to an ultimate finding, supported by evidence, that public convenience required the abandonment.

How can that case be cited by appellee to support its position here that a hearing does not have to be held, that **no findings** have to be made, that nothing has to be considered, and that the filing of its application to abandon is all that has to be done to make the abandonment proper and consistent with the Constitutional division of power between the Federal Government and the states?

If the procedure in the *Colorado* case had been followed here we would not be in court.

When appellee says that "The opinion makes it plain that findings were not a matter of constitutional necessity . . ." appellee shows a lack of careful reading. In that case the Supreme Court specifically said: "The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in the Shreveport case, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce." Findings must be made to establish this jurisdictional or constitutional basis before state power is overridden. While certain findings in the *Colorado* case did not have to be made, as **phrased** by the State, this is far from saying, as appellee does, that **no** findings have to be made. A careful reading of the case will show it does not stand for that proposition.

The *Texas* case and the *Colorado* case can be very easily harmonized. In fact, they were both decided under the same Federal statute, the Transportation Act of 1920.

Where Congress attempts to supersede state power over intrastate commerce without making some finding that such action is necessary to promote or protect interstate commerce (in whatever form of words the finding may take), Congress is going beyond its power. *Texas v. Eastern Texas R.R. Co.*, 258 U. S. 204. Where Congress does find, based upon evidence, that the intrastate operations of a railroad burden its interstate operations, Congress can exercise the **power** which it has to supersede state control. *Colorado v. U. S.*, 271 U. S. 153.

The *Colorado* case is an example of the proper exercise of Federal power, where hearings were had, evidence adduced, findings made, and the conclusion reached that public convenience required the abandonment. In this case none of that was done.

The *Colorado* case cannot be used to justify the exertion of Federal power here in superseding state action where the method was entirely different.

Appellee also relies upon *Katzenbach v. McClung*, 379 U. S. 294, for the proposition that findings are not required on a case by case basis. That case involved the Civil Rights Act as applied to a local restaurant serving interstate travelers. In that case Congress passed the law as to all such restaurants. The only function for the Court to perform was to determine whether a restaurant came within the definition and within the Act. In the present case not all intrastate trains are declared to be a burden on interstate commerce. Each case must be dealt with on its facts. In the *Katzenbach* case the Court found that the legislators in light of the facts and testimony before them had a rational basis for setting up the regulatory scheme involved. In the *Katzenbach* case the absence of findings

in the statute was not crucial since "the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate."

There is, as pointed out, a very distinct difference between that case and the case at bar. In *Katzenbach*, Congress was saying that **all** restaurants which serve interstate travelers or serve food a substantial portion of which has moved in interstate commerce **is bound by the act not to discriminate.** Congress could do this based upon the evidence before it.

In the Act under question, there is no attempt to subject all of the interstate trains serving intrastate commerce as well to automatic discontinuance. If the Act read that way, then the Court would have a different question. In this case, however, Congress, has not so said. Whether an intrastate operation is to be discontinued along with the interstate operation is a matter left to be determined on a case-by-case basis. The I.C.C. for example can decide that in any given case under 13a(1), the line should continue to operate because there is no burden on interstate commerce. We therefore do not have the sweeping situation present in *Katzenbach* and *Wickard v. Filburn* or *U. S. v. Darby.*

We are therefore not arguing that Congress should set up a case by case determination for the discontinuance. Congress has already set it up that way. **But what Congress did not provide for, to which we object, is the manner or method by which State power is to be superseded, the normal way being by hearings and a finding,** as in the *Colorado* case.

We therefore submit that the Act in question is unconstitutional, not because of the lack of power in Con-

gress, but the manner in which that power is sought to be exercised.

II. RES JUDICATA AND FULL FAITH AND CREDIT

Appellee claims that *Kalb v. Feuerstein* and *U. S. v. U. S. Fidelity Co.* control on the issue of full faith and credit and *res judicata*. In *Kalb* the Federal questions would not have been preserved for review in the Supreme Court since once the bankruptcy court took jurisdiction the State court lost it and the Supreme Court, as well as the State court, on its own motion, could dismiss the case for lack of jurisdiction. The Federal questions were therefore not to be preserved by appealing through the State courts. The same thing can be said in *U. S. v. U. S. F. & G. Co.*, 309 U. S. 506, where the State court would have had to dismiss the action or your Honorable Court would have had to dismiss same for lack of jurisdiction, since exclusive jurisdiction lay only in the Federal District Court situated in the Indian reservation.

But not so in this case. The Federal questions are fully preserved in the State litigation and could be preserved on up to your Honorable Court. There is an appropriate avenue through the State courts in this case not available in the other cases cited. Whether an Act of Congress is constitutional can be decided by the State courts and review preserved in your Honorable Court just as well by appeal through the State courts as a suit originating in the Federal court. The Federal court is not the exclusive guardian and protector of the Constitu-

tion. State courts are equal partners in this pursuit. For this purpose a State court is an intermediate tribunal acting under the Supreme Court of the United States.

Appellee therefore by waiving its right to prosecute its appeal through to the State courts has lost its right to relitigate the matter anew in the Federal courts.

CONCLUSION

The questions presented are substantial and require plenary consideration. Probable jurisdiction should be noted.

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